(13)

No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioners,

v.

AMERADA HESS SHIPPING CORPORATION and UNITED CARRIERS, INC.

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

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August 30, 1988

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MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group (the Law Group) moves for leave to file the attached brief **Amicus Curiae**. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

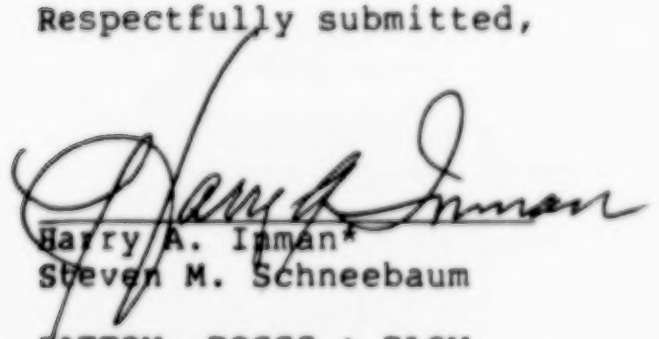
The Law Group has participated as Amicus in litigation concerning the use of international human rights norms in domestic courts, including such cases as Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984) and many others. Amicus therefore has a familiarity with and a perspective on the incorporation of international law into the law of the United States, and on 28 U.S.C. § 1350

in particular, that may aid the Court in deciding this case.

The enclosed Brief of the Law Group is limited to those issues of which Amicus has some litigation experience and substantive expertise. Amicus is not aware of any other presentation of these arguments to the Court.

Counsel for Petitioner, and counsel for Respondent United Carriers, Inc., have both declined to consent to the filing of the enclosed Brief, necessitating this motion.

Respectfully submitted,



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BRIEF OF AMICUS CURIAE THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

INTEREST OF AMICUS

The International Human Rights Law Group is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals.

In particular, the Law Group has appeared as Amicus Curiae in a number of U.S. cases applying and interpreting the Alien Tort Claims Act, 28 U.S.C. § 1350, notably Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984). It is especially concerned that the caselaw developing § 1350 be consistent, coherent, and effective in implementing the international law of human rights.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act (FSIA) provides the exclusive basis for federal jurisdiction over Petitioner. The FSIA provides a number of circumstances in which jurisdiction over foreign sovereigns may be taken. Whether the FSIA conditions are met in this case, however, has not been briefed in the courts below and is not part of this Court's grant of certiorari.

Resolution of the case at bar, therefore, should be by virtue of remand to the lower courts to consider whether jurisdiction may be asserted consistently with the FSIA. It is not necessary--and indeed would be inappropriate--for the Court to address the meaning or scope of 28 U.S.C. § 1350, a statute of tremendous importance in giving domestic legal content to the international law of human rights.

ARGUMENT

I. Introduction

This case concerns the narrow question whether the Alien Tort Claims Act, 28 U.S.C. § 1350, can be the basis for federal civil jurisdiction over a foreign sovereign defendant, notwithstanding the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-9.

Respondents are the owner and charterer of S/T HERCULES, which was allegedly destroyed after an unprovoked attack by Petitioner's military forces, on the high seas, during the war over the Falkland Islands in June 1982. The HERCULES, of Liberian registry[1/], was

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1/ Normally, The Jones Act requires that movements of cargo between U.S. ports be in U.S.-flagged vessels. 46 U.S.C. § 883. There is an exception in the Act, however, covering the Virgin

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returning in ballast from an oil refinery in the U.S. Virgin Islands to Valdez, Alaska when she was struck.

Respondents brought this action in the United States District Court for the Southern District of New York, asking the court to take jurisdiction under 28 U.S.C. § 1350. Petitioner asserted immunity under 28 U.S.C. §§ 1330 and 1604, and the district judge sustained that claim. 638 F. Supp. 73 (S.D.N.Y. 1986). Judge Carter held that the Foreign Sovereign Immunities Act (FSIA) is the exclusive basis for jurisdiction over a foreign state, that Argentina is entitled to immunity unless one of the waiver provisions of the FSIA applies, and that, on the facts as presented,

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Islands, the location of the largest oil refinery in the Western world. 46 U.S.C. § 877. See American Maritime Association v. Blumenthal, 590 F.2d 1156 (D.C. Cir. 1978), cert. den., 441 U.S. 943 (1979).

there was no support for the claim that Petitioner's immunity was waived.

Over the dissent of Judge Kearse, the U.S. Court of Appeals for the Second Circuit reversed. 830 F.2d 421 (2d Cir. 1987). Chief Judge Feinberg, writing for the majority, opined that the FSIA does not apply when a sovereign has violated international law, at least in a non-commercial context, and that 28 U.S.C. § 1350--which contains no express or implied exclusion of actions against sovereigns--provides a basis for jurisdiction so long as its three criteria are met: the plaintiff must be an alien, the action one "in tort only," and the conduct at issue "in violation of the law of nations." All three, he found, were satisfied; the last because an unprovoked attack on an unarmed, neutral vessel is prohibited by both customary law and treaties to which the

United States and Argentina are parties.

After the Second Circuit declined to rehear the case, this Court granted certiorari. 108 S.Ct. 1466 (1988).

II. The FSIA is the Exclusive Basis for Federal Court Jurisdiction over Foreign Sovereigns; However, It Does Not Necessarily Follow That This Case Must Be Dismissed on Remand.

Amicus the International Human Rights Law Group agrees with Petitioner and the United States that in the circumstances presented by this case, the FSIA is the exclusive basis for jurisdiction. See Brief for the United States As Amicus Curiae Supporting Petitioner at 8-23; Brief for Petitioner at 18-29. However, Amicus submits that it does not follow that the case must be dismissed on remand.

A. The Exclusivity of the FSIA

Chapter 85 of Title 28, United States Code, defines the jurisdiction of the district courts. Since those courts

are courts of special jurisdiction, their authority to hear cases is limited by these provisions, which carry out the Constitutional grant of the judicial power. Article III, § 2(1).

Actions against foreign states are governed by 28 U.S.C. § 1330, and in particular by the following:

> (a) The district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state ... as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a). Sections 1605-1607 provide an itemized list the categories of cases in which foreign sovereigns are not entitled to immunity.

Given this framework, it is very difficult to argue that there can be federal jurisdiction over Petitioner if none of the waiver conditions set out in § 1330 is met. Whether or not Petitioner's attack on the HERCULES was--as Amicus believes that, if proved, it was--a violation of the rights of a neutral ship to ply the high seas whether in peacetime or not, that fact cannot determine the power of the federal courts to decide the instant case. Amicus submits that the Second Circuit was simply incorrect in describing as "[t]he modern view" the proposition that "sovereigns are not immune from suit for their violations of international law." 830 F.2d at 425.[2/] Indeed, the fact that no

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2/ The Second Circuit confused immunity from international responsibility with immunity from suit in another nation's domestic

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reported judicial decision discussing the FSIA articulates that conclusion militates most strongly against the Second Circuit's view.

Not only is the Second Circuit's opinion regarding the exclusivity of the FSIA as a jurisdictional basis inconsistent with the statute itself, and with the caselaw, but it is logically untenable. If proof that a foreign sovereign violated international law vitiated its immunity, then the concept of sovereign immunity would be destroyed, since in virtually every case where a foreign state is a defendant a plaintiff can find some way of alleging a violation of international law. Thus the determination of whether the defendant is immune from suit would depend

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courts. See F.L. Kirgis, Jr., Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts, 82 Am. J. Int'l L. 323, 325 (1988).

upon the outcome on the merits: if in the end international law was violated, the sovereign would ipso facto lose its immunity and be liable, but if after trial the violation was not proved, then the state would be immune from judicial process.

A system in which immunity from suit is logically dependent upon the outcome of an action on the merits is senseless. Nor is there a single reported case that supports the view that, in passing the FSIA, Congress created such a framework. Certainly nothing in this Court's major decision interpreting the FSIA--Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)--suggests that sovereign immunity does not protect a foreign state alleged to have violated international law. This Court said through Chief Justice Burger that Congress "clearly intended" the

FSIA to govern "all actions against foreign sovereigns," Verlinden, 461 U.S. at 491 n. 16, emphasis added, and Amicus sees no way of reconciling the opinion of the court below with that unexceptionable pronouncement.

And yet, in the submission of Amicus, the proposition that jurisdiction over Petitioner may be established only pursuant to the FSIA does not entail the conclusion that this case must be dismissed on remand. The FSIA codifies a restrictive theory of immunity, and there are numerous circumstances in which a foreign state will be required to answer and to defend a suit in U.S. courts. 28 U.S.C. § 1605, 1607. The one of arguable applicability to the facts of this case is contained in 28 U.S.C. § 1605(a)(1): the waiver of immunity "by implication."

B. Waiver of Sovereign Immunity

Before the FSIA was enacted, the courts were very reluctant to find that states had waived their immunity from suit "by implication." Implied waivers were found, before 1976, in three types of cases: when states agreed to arbitration, when they agreed that contractual disputes would be resolved under another state's law, and when they pleaded to a complaint without asserting the defense of immunity. See Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985).

Whatever the law before the FSIA, in the days of executive branch "suggestions of immunity" that were essentially unreviewable by the courts, there is no reason in precedent or policy to apply the same reasoning now. It is open to the courts to find a sovereign to have waived its immunity

"by implication" when the sovereign's acts have been so flagrant in their disregard for fundamental norms of international law as to call into question its capacity to claim the special status that attaches to members of the international community.

There are actions by which a sovereign implicitly waives its immunity from jurisdiction in foreign courts, just as there are actions by which an individual becomes subject to "universal jurisdiction," and waives his ability to claim, for example, that he has inadequate contact with the forum to justify requiring him to defend himself there. Over an individual, universal jurisdiction arises with respect to acts universally condemned, so that the perpetrator has become hostis humani generis, an enemy of all mankind.3/ See, e.g., Matter of the Extradition

of Demjanjuk, 612 F. Supp. 544, 556 (N.D. Ohio 1985), aff'd, 762 F.2d 1012 (6th Cir. 1985), cert. den., 475 U.S. 1016 (1986).

The analogous acts of sovereigns, those which entail the loss of such special jurisdictional privileges as immunity, are acts in violation of jus cogens, peremptory norms of international law that permit no derogation. Restatement (Third) of Foreign Relations Law, § 102, note k. These norms are the basic rules of conduct: no state may torture or murder its citizens; no state may deliberately cause "disappearances," or trade in slaves, or commit genocide. Jus Cogens is always binding on states; by contrast, jus dispositivum

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3/ The waiver of objections to jurisdiction applies in both civil and criminal cases. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

derives from their consent, and may be changed when that consent no longer obtains. See D.F. Klein, A Theory for the Application of the Customary International Law of Human Rights, 13 Yale J. Int'l L. 332 (1988). Since deviation from jus cogens is not permitted to a state under any circumstances, a sovereign committing such a deviation relinquishes its right to be treated as such, and waives its immunity to jurisdiction "by implication."4/

To acknowledge the existence of jus cogens norms of public international law is not thereby to accept any particular principle as entitled to that status.

4/ Every grant of immunity is subject, pursuant to the FSIA, to "existing international agreements to which the United States is a party." 28 U.S.C. § 1604. To the extent that immunity would be inconsistent with such an agreement, it must also be denied.

Yet since there exist rules of law so fundamental that their violation is incompatible with international recognition of sovereignty, the issue at stake in the case before the Court becomes somewhat different from the one addressed by Chief Judge Feinberg. For the concept of jus cogens as expounded here by Amicus suggests that states can, by their conduct, waive sovereign immunity "by implication," and hence that jurisdiction over them may be fully compatible with the FSIA.

Amicus expresses no view on whether Petitioner's attack upon Respondents' neutral ship on the high seas constituted a concomitant attack on such a peremptory norm. For while every complaint against a foreign sovereign will assert a violation of international law, the claim that a jus cogens norm was violated will be judged by a

necessarily stricter standard. Whether such a claim can be made out here is a different question from that considered below, and it deserves full briefing and full consideration on remand. If Argentina violated jus cogens, then jurisdiction over it is proper under the FSIA; if it did not, and if no other FSIA exception applies, then Petitioner is immune from the jurisdiction of the district court and the complaints should have been dismissed.5/ Since this issue was not addressed by the district court or the court of appeals, and was no part of this Court's writ of certiorari, Amicus suggests that the proper course

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5/ If Petitioner's immunity has been waived under the FSIA, then its arguments about in personam jurisdiction--Petitioner's Brief, pp. 34-48--fail, since they depend upon the claim that subject matter jurisdiction is lacking. See 28 U.S.C. § 1330(b); Verlinden, 461 U.S. at 485 n. 5.

would be to have this case remanded for a determination of whether the norm of international law protecting the rights of neutral shipping has or has not become a peremptory norm from which no derogation may be permitted.

Such a resolution of the case before this Court would:

1) uphold the exclusivity of the FSIA as the basis for jurisdiction over Petitioner;

2) recognize the international principle that a state acting in violation of jus cogens thereby waives its claim to the special privileges (such as sovereign immunity) unique to states; and

3) defer to a later day, when the issue is fully briefed (whether in this case after remand or a subsequent one), the question of which norms have acceded to the level of jus cogens.

C. Conclusion

Amicus respectfully submits that the decision of the Second Circuit was erroneous to the extent that it found jurisdiction over Petitioner outside the FSIA, but that the assertion of jurisdiction may ultimately be correct if Argentina's conduct in destroying the HERCULES deprived it of sovereign immunity "by implication," within 28 U.S.C. § 1605(a) (or if some other FSIA exception is applicable). Whether that is the case depends upon an analysis of the norm of public international law whose violation is at the heart of the complaint. But that issue has not been briefed, and should not now be decided.

III. This Case Presents No Question Concerning the Meaning or Scope of 28 U.S.C. § 1350.

A. Introduction

For the reasons set forth above,

jurisdiction in this case turns exclusively on 28 U.S.C. § 1330(a). If Argentina's immunity has been waived, the FSIA provides jurisdiction and the suit may go forward; otherwise, it may not. Respondents' reliance upon 28 U.S.C. § 1350 (sometimes called "the Alien Tort Claims Act") as a basis of jurisdiction is misplaced, not because of a misreading of that statute, but because the exclusivity of the FSIA preempts any consideration of § 1350.

Amicus respectfully urges that no examination of 28 U.S.C. § 1350 is needed for proper resolution of this case. Given the extremely important and complex jurisprudence of the Alien Tort Claims Act, involving developments in the area of human rights law far removed from the issues presented here, this case should not be the occasion for the first Supreme Court treatment of a

statute as venerable as a provision (§ 9(b)) of the First Judiciary Act of 1789.[6/] The Solicitor General's casual, illogical, and historically groundless suggestions concerning the interpretation of § 1350--at variance with Department of Justice views spanning nearly two centuries--should not cause this Court to venture beyond what is necessary to resolve the case at bar. Moreover, the United States correctly noted in its brief in support of the petition for certiorari that this issue is not presented for review.

B. The Modern History of 28 U.S.C. § 1350

The Alien Tort Claims Act, passed

6/ Section 1350 was discussed by this Court in O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908), but that case ultimately turned upon whether the action was one "in tort only," and not upon questions of international law or its significance within the law of the United States.

as part of the First Judiciary Act of 1789, was intended to insure that aliens' tort claims raising issues of international law could be adjudicated in federal rather than state courts. This Court has recognized it as one of several statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and ... a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n. 25 (1964).

The Alien Tort Claims Act has been accepted as the exclusive basis for federal jurisdiction in a line of modern cases: Adra v. Clift, 195 F. Supp. 875 (D. Md. 1961); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), on remand, 577 F. Supp. 860 (E.D.N.Y. 1984); and Forti v. Suarez-Mason, 672 F. Supp. 1531

(N.D. Cal. 1987).

In Filartiga, the plaintiffs sued a Paraguayan living in the United States for gross violation of fundamental human rights -- the torture and summary execution of their son and brother, Joelito Filartiga. The United States, in an Amicus brief jointly submitted by the Departments of Justice and State argued that § 1350 jurisdiction is proper where aliens sue for tortious injuries committed in violation of customary international law, and where the alleged tortfeasor has sufficient contacts with the forum to render him liable to suit there. Memorandum for the United States As Amicus Curiae submitted in Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 601-06 (1980).

The Court of Appeals for the Second Circuit adopted the view expressed by

the United States, and other courts have subsequently followed it. Filartiga, 630 F.2d 876; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (Jensen, J.); see also Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1985) (Edwards, J., concurring); Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986); Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985).7/

7/ The Alien Tort Claims Act has also been the subject of a virtually unprecedented amount of scholarly commentary, the consensus of which is that § 1350 "was intended to avoid local bias in aliens' suits and to obtain uniform judicial interpretation and application of the law in cases implicating international concerns." See e.g., Note, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L. Rev. 127, 132-33 (1986); Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute, 18 N.Y.U. Int'l L. & Pol. 1, 11-31 (1985); Blum & Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act

Continued

Most recently, in Forti, two Argentine citizens brought suit against an Argentine in the United States for torture, prolonged arbitrary detention, disappearance, and summary execution. Judge D. Lowell Jensen upheld jurisdiction in an exhaustive opinion, stating that "Congress intended § 1350 to provide concurrent federal jurisdiction over alien tort claims alleging treaty or customary international law violations in order to facilitate federal oversight of matters involving foreign relations and international law." Forti, 672 F. Supp. at 1540 n. 6;

After Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 87-97 (1981); D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int'l L. 62-67 (1988). These and other scholarly authorities provide a rich historical analysis of the Act, and demonstrate that its initial enactment in 1789 flowed directly from the Framers' concern that international law matters should be heard in federal courts.

see also Adra v. Clift, 195 F. Supp. at 865.

Both Forti and Filartiga could have been brought in state court, under the common law principle of "transitory torts," which provides that a tort-feasor's liability follows him wherever he goes. See McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843) (citing Mostyn v. Fabrigas, 1 Cowp. 161 (1774); Slater v. Mexican National R.R. Co., 194 U.S. 120, 126 (1904). Section 1350 simply permits the suit to be brought in federal court when it raises important questions of international law. This follows from the eighteenth century concern that matters potentially affecting foreign affairs be the exclusive province of the federal government. See Dickinson, The Law of Nations as Part of the National Law of the United States (parts I & II), 101 U.

Penn. L. Rev. 26, 792 (1952-53).

The human rights cases are different from this case in two significant respects. First, the defendants have been individuals, not sovereigns, and thus the FSIA is not an issue. Second, the cases involve violations of core norms of international human rights law. These norms are assigned an elevated status in international law, above treaties and ordinary customary law. Thus, Section 702 of the Restatement (Third) of Foreign Relations Law (1987), entitled "Customary International Law of Human Rights," lists a number of acts, including torture, slavery, prolonged arbitrary detention, and disappearances, as peremptory, non-derogable norms, i.e., norms that cannot be violated under any circumstances. See Tel-Oren, 726 F.2d at 781 (Edwards, J., concurring).

Because this case involves neither an individual defendant nor a violation of an international human rights norm, the Court's decision in this case need not and should not disrupt this settled body of jurisprudence.

Such human rights cases against individuals also present issues very different from those presented here. There is no split among the Circuits on the construction and application of the Alien Tort Claims Act in that context. Indeed, this Court denied certiorari on the only case to attempt to raise directly the issue of construction of the statute. Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985). Human rights cases continue to percolate in the lower courts; indeed the Court of Appeals for the Ninth Circuit is currently considering all of the § 1350 human rights issues in a consolidated

appeal of several cases brought against former Philippine President Ferdinand Marcos. Trajano v. Marcos, Nos. 86-2448, 86-2496, 86-15039, 87-1706, 87-1707 (9th Cir., argued March 1988).

Another significant consequence of Filartiga[8/] and subsequent decisions applying the Alien Tort Claims Act lies in the discussions of incorporating international law, including customary international law and especially the customary international law of human rights, into the law of the United States. While the principle of incorpo-

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8/ The Filartiga holding has been discussed at great length by the U.S. Court of Appeals for the District of Columbia Circuit, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. den., 470 U.S. 1003 (1985). One judge said that he thought the case wrongly decided, Tel-Oren, 726 F.2d at 826, n. 5 (Robb, J., concurring), while Judge Edwards emphatically endorsed the Filartiga holding. 726 F.2d at 776-77 (Edwards, J., concurring).

ration is not new--see, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900)--its modern manifestation is very significant. It has encouraged courts to consider even constitutional rights in the context of evolving international standards. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). See, e.g., Thompson v. Oklahoma, 108 S. Ct. 2687, 2696 (1988). It has permitted reliance in U.S. courts upon international legal norms protecting human rights, and it has underscored their legal and binding (as opposed to their moral and hortatory) nature. It has illustrated the proposition, in the words of Judge Eugene Nickerson, that "plainly international 'law' does not consist of mere benevolent yearnings never to be given effect." Filartiga, 577 F. Supp. at 863.

Section 1350 has also given rise to

considerable controversy. In Tel-Oren, for example, Judges Edwards and Bork disagreed sharply on whether the reference to "the law of nations" in the statute is to international law in 1789 (Judge Bork) or international law today (Judge Edwards). They disagreed too on whether, to establish jurisdiction under § 1350, a plaintiff must show not only a consensus on the existence of an international norm, but also consensus on the availability of domestic judicial remedies to enforce it.

These are difficult questions. But this is not the case in which they should be addressed or resolved. This case turns on the much more straightforward matter of the proper construction of the FSIA.

C. The Solicitor General's Suggested Construction of Section 1350 Is Contrary to All Relevant Authority and Should Be Rejected.

The Solicitor General argues in a footnote that § 1350 does not apply to extraterritorial torts, and that neither it nor international law provides a "cause of action" in such cases. Brief of the United States as Amicus Curiae, at 28-29 n. 26. Both suggestions have been soundly rejected by courts, scholars, and previous Justice Departments, and they should not be accepted by this Court.

On its face, § 1350 provides federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (emphasis added). The Solicitor General would rewrite the statute to require aliens not only to meet the requirements Congress articu-

lated in § 1350, but also to show that (1) the tort was committed inside the United States or by a person who has a "nexus to the United States or its nationals"; and (2) the tort violates "an Act of Congress that extends the substantive law of the United States to wrongs committed by one alien against another outside of the United States and creates a private cause of action for a violation." Brief of the United States, at 28-29 n. 26. Neither of these novel jurisdictional "conditions" appears anywhere in the text or legislative history of the statute, or in the body of judicial precedent construing it. Nor should the passing comments in the Solicitor General's footnote be the occasion for this Court to rewrite the Alien Tort Claims Act.

When arguing for a strict construction of the FSIA (a construction that

Amicus submits is the correct one), the Solicitor General notes that statutory language must be regarded as conclusive unless there is clear legislative history to the contrary, and jurisdictional statutes in particular must be "'construed with precision and with fidelity to the terms by which Congress expressed its wishes.'" Brief of the United States, at 9, quoting Cheng Fan Kwok v, INS, 392 U.S. 206, 212 (1968); see also Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Yet he invites a conceptually different approach to the Alien Tort Claims Act. Neither logic not history, neither precedent nor policy provides support for the proposed interpretation of § 1350.

Not surprisingly, no court has accepted the Solicitor General's novel "territorial" restriction. See Randall,

supra, 18 N.Y.U. J. Int'l L. & Pol. at 62 (§ 1350 jurisdiction "has never been denied on the ground that the statute itself does not confer jurisdiction over extraterritorial tort actions").[9/]

The Solicitor General's alternative suggestion requiring an Act of Congress extending the substantive law of the United States to disputes between aliens abroad, and expressly providing a private cause of action for violations, would render § 1350 meaningless (there are no such statutes). Moreover, it ignores the consistent interpretation by the courts and previous Justice Departments that the Alien Tort Claims Act itself provides a right of action.

The courts have consistently held

9/ Whatever "nexus" between the defendant and the forum is required would be satisfied whenever the defendant is subject to the personal jurisdiction of the courts.

that 28 U.S.C. § 1350 provides a right of action. Filartiga, 630 F.2d at 887; Tel-Oren, 726 F.2d at 780 (Edwards, J., concurring); Forti, 672 F. Supp. at 1539; Guinto v. Marcos, 654 F. Supp. at 279-80; Von Dardel v. USSR, 623 F. Supp. at 256-59. Moreover, for nearly two centuries, from 1795 to 1980, the Justice Department consistently took the position that § 1350 provided a right of action for a civil remedy to aliens tortiously injured in violation of international law.10/

The Alien Tort Claims Act is a

10/ 1 Op. Att'y Gen. 57, 59 (1795) (§ 1350 provides British citizen with a civil "remedy" for injuries suffered in Africa); 26 Op. Att'y Gen. 250, 252-53 (§ 1350 "provides a forum and a right of action"); Memorandum for the United States As Amicus Curiae submitted in Filartiga v. Pena-Irala, reprinted in 19 I.L.M. 585, 601-06 (1980) (tort in violation of the law of nations gives rise to a judicially enforceable remedy under 28 U.S.C. § 1350).

vital mechanism for ensuring that the fundamental tenets of international human rights law have legal meaning, and that torturers, murderers, slave traders, and other international outlaws do not find safe haven in the United States. Amicus, an organization concerned with the advancement of international human rights, urges the Court not to undermine these important developments in a case that should be dealt with by construction of the FSIA, and in which the complex and sensitive questions to which § 1350 gives rise have not been briefed.

D. Conclusion

In this case, any discussion of 28 U.S.C. § 1350 will necessarily be obiter. Either there is jurisdiction over Petitioner pursuant to the FSIA or there is not. The Alien Tort Claims Act--notwithstanding Respondents' con-

tentions in their complaints and in their briefs--has nothing to do with it. This Court should decline the invitation to address that Act, its meaning or its scope, and should specifically reject the casual suggestion of the Solicitor General to limit it.

PROPOSED RESOLUTION

For the foregoing reasons, Amicus Curiae (The International Human Rights Law Group) respectfully submits that the Second Circuit erred in extending jurisdiction over Petitioner otherwise than pursuant to the Foreign Sovereign Immunities Act; that jurisdiction is proper if, and only if, one of the exceptions to immunity set out in that Act

obtains (a question to be resolved in the courts below after full briefing and deliberation); and that, given this premise, no issue concerning the meaning or scope of 28 U.S.C. § 1350 is presented for this Court's determination.

Respectfully submitted,

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August 30, 1988